

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

STEVE HERBERT,

Appellant,

V.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

Crim. App. No. 1997-001

Re: Terr. Ct. Crim. F321/95

On Appeal from the Territorial Court of the Virgin Islands

Considered May 18, 2001

Filed December 10, 2000

BEFORE : **RAYMOND L. FINCH**, Chief Judge of the District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **EDGAR D. ROSS**, Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

ATTORNEYS :

Richard H. Dollison, Esq.

St. Thomas, U.S.V.I.

Attorney for Appellant,

Carol S. Moore, Esq.

Assistant Attorney General

St. Thomas, U.S.V.I.

Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM.

On August 9, 1995 police arrested Steve Herbert ["Herbert" or "appellant"], and charged him with first degree murder and two counts of robbery in connection with the June 30, 1995, robbery of Modesto Robles ["Robles"], which left one bystander injured and another dead. A jury found Herbert guilty of both robbery counts and of second degree murder. After the trial court denied Herbert's motion for a new trial, he filed a timely notice of appeal. Herbert bases his appeal on an alleged Brady violation stemming from the prosecution's alleged withholding of information that may have identified a third party as the perpetrator of the crimes in question. Counsel for Herbert subsequently filed a motion to withdraw along with an *Anders* brief, which stated that: (1) a conscientious review of the record found no appealable issues; and (2) there was no reversible error on the part of the trial court in denying Herbert's motion for a new trial based on newly discovered evidence and/or undisclosed *Brady* material.

Accordingly, this Court must determine whether a Brady violation existed and whether to grant counsel's motion to withdraw.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 1995, an assailant robbed Robles in the area of Market Square on St. Thomas. As the assailant fled the scene, he fired a shot which passed through bystander Marcelina Confidente ["Confidente"] and killed another bystander, Trelton Ryan, a/k/a Bucky ["Ryan"]. Police arrested Herbert pursuant to an arrest warrant, on August 9, 1995, and charged him with first degree murder and two counts of robbery. The only evidence linking Herbert to the crime was the identification testimony of Confidente and Robles. Herbert presented two alibi witnesses who placed him elsewhere at the time of the shooting.

Toward the end of Herbert's trial, rumors arose of a tape or transcripts of a tape in which the identity of the person who committed the robbery and murder in Market Square was revealed. Herbert did not make a specific *Brady* request for the tape or transcript and no one could find the tape or transcript before the trial finished.

On July 17, 1996, the jury returned verdicts of guilty on the two robbery counts and a lesser-included offense of second degree murder. The trial court sentenced Herbert to two five-year prison terms and a fifteen-year prison term to run concurrently. After the verdict, Herbert filed a motion for judgment of acquittal, or, in the alternative, for a new trial,

based on, *inter alia*, the government's alleged *Brady* violation for failure to turn over the tape or transcript in its possession. The trial court denied the motion, stating that "the few facts supplied by Defendant . . . do not indicate that the Government prosecutor in this case knew of the alleged evidence." (Unnumbered pages in App. to Br. of Herbert.) Herbert thereafter filed a timely notice of appeal.

On April 4, 1999, counsel for Herbert filed simultaneously a motion to withdraw and an *Anders* brief stating that the appeal was "wholly frivolous." Counsel served Herbert with a copy of the brief. Herbert moved for an extension of time to respond, which this Court granted. Herbert, however, did not ultimately file a response to the brief.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review final judgments and orders of the Territorial Court in criminal cases. See 4 V.I.C. § 33.¹ The denial of a motion for a new trial is reviewed for abuse of discretion. See *Virgin Islands v. Sampson*, 42 V.I. 247,

¹ See V.I. CODE ANN. tit. 4, § 33 (1997); Revised Organic Act of 1954 § 23A; 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2000), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["REV. ORG. ACT"].

252, 94 F. Supp. 2d 639, 643 (D.V.I. App. Div. 2000). Our review of claims of constitutional gravity is plenary. See *Nibbs v. Roberts*, 31 V.I. 196, 204 (D.V.I. App. Div. 1995). When a *Brady* violation is alleged, the Court reviews issues of law *de novo* and factual findings for clear error. See *United States v. Ramos*, 27 F.3d 65, 67 (3d Cir. 1994).

B. Counsel's Motion to Withdraw

"On counsel's motion to withdraw from an appeal by an indigent defendant, a reviewing court must examine the proceedings to decide whether the case is wholly frivolous, unless it chooses to employ some alternative method of ensuring that defendants' rights to effective representation are not compromised." *Maddox v. Government of the Virgin Islands*, 121 F. Supp. 2d 457, 459 (D.V.I. App. Div. 2000) (citing *Anders v. California*, 386 U.S. 738, 744 (1967) and *Smith v. Robbins*, 528 U.S. 259, 264 (2000)). Under the *Anders* procedure, counsel's request "must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. "[T]he court . . . then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous," *id.*, "unless it chooses to employ some alternative method of ensuring that defendants' rights to

effective representation are not compromised." *Maddox*, 121 F. Supp. 2d at 459 (citing *Smith*, 528 U.S. at 264).

Counsel for Herbert has raised an issue that may support a new trial--the possible existence of *Brady* material allegedly implicating someone else as the perpetrator. Since he has also expressed his belief that an argument based on this issue would fail and that the trial court did not commit reversible error, we will grant counsel's motion to withdraw and appoint new counsel to continue Herbert's representation on appeal.

C. The Possible Existence of Allegedly Undisclosed *Brady* Material Requires an Evidentiary Hearing.

In *Brady v. Maryland*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The trial court relied on Herbert's failure to request the information and on the prosecutor's alleged lack of knowledge of the evidence in denying Herbert's motion for a new trial. We will remand for an evidentiary hearing.

Materiality, not the failure to request information, is the touchstone of a *Brady* violation. *Brady* thus applies when the defendant failed to make a *Brady* request. See *United States v.*

Agurs, 427 U.S. 97, 107-14 (1976). Accordingly, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (adopting the standard in *Strickland v. Washington*, 466 U.S. 668 (1984)).

Regarding the prosecutor's knowledge of the tape or transcript, knowledge of exculpatory information in the hands of the government is normally imputed to the prosecuting attorney, even if he does not have actual possession of the evidence. When *Brady* material is in the file of an unrelated case, however, the defendant has the burden of showing that the prosecutor had actual knowledge or some reasonable cause to know of its existence. See *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993) (holding that knowledge can be actual or constructive). Since the trial judge ruled without an evidentiary hearing that there was no *Brady* violation, we will remand in order for the trial court to give Herbert the opportunity to establish the location of the tape or transcript, whether the Government had possession of it, whether the prosecutor knew or should have known of it and otherwise attempt to establish his *Brady* claim.

III. CONCLUSION

This Court will grant the motion to withdraw of Herbert's counsel, appoint new counsel to continue to pursue this appeal and remand to the Territorial Court for an evidentiary hearing on the alleged *Brady* evidence.

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

STEVE HERBERT,

Appellant,

V.

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee.

)
)
)
)
)
)
)
)
)
)
)

Crim. App. No. 1997-001

Re: Terr. Ct. Crim. F321/95

On Appeal from the Territorial Court of the Virgin Islands

Considered May 18, 2001

Filed December 10, 2000

BEFORE: **RAYMOND L. FINCH**, Chief Judge of the District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **EDGAR D. ROSS**, Judge of the Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

ATTORNEYS :

Richard H. Dollison, Esq.

St. Thomas, U.S.V.I.

Attorney for Appellant,

Carol S. Moore, Esq.

Assistant Attorney General

St. Thomas, U.S.V.I.

Attorney for Appellee.

ORDER

For the reasons set forth in the accompanying Opinion of
even date, it is hereby

ORDERED counsel's motion to withdraw from this matter is
GRANTED; it is further

ORDERED that new counsel will be appointed to pursue
Defendant Herbert's appeal and represent him in proceedings in
the Territorial Court; and it is further

ORDERED that this matter is remanded to the territorial
court for an evidentiary hearing on the alleged *Brady* violation.

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk